TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 184.

J. G. DAVIS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED MAY 26, 1915.

(23,722)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 18, 1914.

1 In the Supreme Court of the United States.

J. G. DAVIS, Plaintiff in Error,
vs.
COMMONWEALTH OF VIRGINIA, Defendant in Error.

Writ of Error to the Supreme Court of Appeals of Virginia.

Assignment of Errors.

And now comes the said J. G. Davis, plaintiff in error, by Thomas J. Christian and J. Winston Read, his attorneys, and says that in the record and proceedings, and the judgment rendered in said Supreme Court of Appeals of Virginia, there is manifest error in this, to-wit, the Court erred:

1. In holding that plaintiff in error was not engaged in interstate commerce.

2. In holding that Section 50 of an Act of the Legislature of the State of Virginia approved May 13, 1903, providing for a peddler's license, was constitutional.

3. In holding that the disposing of the frames in the manner, and under the circumstances, disclosed by the record did not constitute interstate commerce, and was not in conflict with, or contrary to, Article 1, Section 8 of the Constitution of the United States.

4. In holding that the plaintiff in error was a peddler within the purview of the aforesaid Act of the Legislature of Virginia.

5. In affirming the judgment of the Corporation Court of the City of Newport News, convicting plaintiff in error of a viola-
2 tion of Section 50 of the aforesaid Act of the Legislature of the State of Virginia.

By reason whereof plaintiff in error prays that said judgments of the Supreme Court of Appeals of the State of Virginia, and the Corporation Court of the City of Newport News, Virginia, may be reversed.

THOMAS J. CHRISTIAN,
J. WINSTON READ,
Attorneys for Plaintiff in Error.

3 [Endorsed:] In the Supreme Court of the United States. J. G. Davis, Plaintiff in Error, vs. Com. of Virginia, Defendant in Error. Assignment of Errors. John Winston Read, Attorney at Law, Newport News, Virginia.

4 In the Supreme Court of Appeals of Virginia.

J. G. DAVIS
versus
COMMONWEALTH OF VIRGINIA.

To the Honorable Judges of the Supreme Court of the State of Virginia:

Your petitioner, J. G. Davis, respectfully shows that on the 13th day of June, 1912, this Honorable Court rendered a judgment affirming a judgment of conviction rendered against your petitioner in the Corporation Court of the City of Newport News in a cause wherein your petitioner was defendant and the State of Virginia Plaintiff, said judgment of conviction being for the sum of One Hundred Dollars ($100.00), together with Eight Dollars and twenty cents ($8.20) damages and Fifty-two Dollars and sixty-five cents ($52.65) costs, amounting in all to One Hundred Sixty Dollars and eighty-five cents ($160.85), and awarded execution thereon, as will appear by reference to the record and proceedings in said cause; that the said Supreme Court of Appeals of Virginia is the highest Court in the State of Virginia in which decision of said cause can be had; that in said cause the State of Virginia prosecuted your petitioner for delivering or selling picture frames, the property of the Empire Art Institute, a non-resident, with its principal office and place of business in the City of Syracuse, State of New York, without a peddler's license, as required by Section 50, of an Act of the Legislature of Virginia, approved May 13, 1903,
5 which Act is in the following words and figures:

"Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles; and whenever a license is granted to a peddler to sell such goods, wares, or merchandise his license shall be valid for one year from date of its issue. Said license shall not be transferable, and any person so licensed shall endorse his name on the said license, and such license shall confer authority to sell at any house or place within the county or city in which the license was granted. Any peddler who shall peddle for sale or sell or barter without a license shall pay a fine of not less than one hundred dollars nor more than five hundred dollars for each offence, one half of which shall go to the informer; and any person selling or offering to sell as a peddler shall exhibit his license on demand of any citizen of the county, city or town in which he sells or offers to sell or barter; and upon his failure or refusal to do so he shall be subject to the penalties of peddling without a license. This section shall be construed to include persons engaged in peddling lightning rods. All persons who do not keep a regular place of business (whether it be in a house, on a vacant lot, or elsewhere), open at all time in regular business

hours, and at the same place, who shall offer for sale goods, wares, and merchandise, shall be deemed peddlers under this act. And all persons who keep a regular place of business open at all times in regular business hours, and at the same place, and who shall personally, or through their agents, offer for sale, or sell, and at the time of such offering for sale, deliver goods, wares, and merchandise, elsewhere than at such regular place of business, shall also be deemed peddlers as above; but this section shall not apply to those who sell or offer for sale, in person or by their employees, ice, fuel, meats, fowls, fish, game, vegetables, fruits, or other family supplies of a perishable nature grown or produced by them; nor to merchants who keep a regular place of business open at all time in regular business hours and at the same place, without a city or town, who shall sell such articles to merchants only residing and doing business in a city or town."

And your petitioner relied on the defense that in disposing of the picture frames, in the manner, and under the circumstances shown by the agreed statement of facts, was Interstate Commerce, and that the said statute of Virginia was unconstitutional and void, being an interference of Interstate Commerce and therefore violative of Article 1, Section 8 of the Constitution of the United States,

6 and your petitioner further relied on the defense that he was not a peddler as is defined by the foregoing Act of the Legislature of Virginia; that said judgment of conviction of your petitioner in the said Corporation Court of the City of Newport News and the judgment of affirmance by this Court is in conflict with, and contrary to the said Article 1, Section 8 of the Constitution of the United States.

Wherefore, your petitioner is aggrieved, and prays for a writ of error with citation and supersedeas, returnable to the Supreme Court of the United States, and prays that said writ of error be allowed, and that a transcript of the record and proceedings in said cause, including the said final judgment therein, duly authenticated, may be sent to the said Supreme Court of the United States, as provided by law, and that such other and further proceedings may be had as may be proper in the premises, and also prays that an order be made, fixing the amount of security, which your petitioner shall give and furnish upon said writ of error; that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And in duty bound, petitioner will ever pray, etc.

J. G. DAVIS, *Petitioner,*
By T. J. CHRISTIAN,
J. WINSTON READ,
Attorneys for Petitioner.

7 [Endorsed:] J. G. Davis vs. Commonwealth. Petition. John Winston Read, Attorney at Law, Newport News, Virginia.

8 In the Supreme Court of Appeals of Virginia.

J. G. DAVIS
vs.
COMMONWEALTH OF VIRGINIA.

On this, the 4 day of December, 1912, came the plaintiff in error, and presented to the Court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Honorable the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the security now being offered by the plaintiff in error, is hereby approved, and the said petition has this day been duly allowed; and it is, therefore, ordered that upon the filing of a bond with the Clerk of this Court in the sum of $200.00, conditioned to prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated this 4th day of December, 1912.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

9 [Endorsed:] J. G. Davis v. Commonwealth. Order granting writ of error. John Winston Read, Attorney at Law, Newport News, Virginia.

10 In the Supreme Court of Appeals of Virginia.

J. G. DAVIS
versus
COMMONWEALTH OF VIRGINIA.

I, James Keith, President of the Supreme Court of Appeals of Virginia, presiding therein at the present time, and upon the argument, hearing and decision of the above entitled cause in said Court, do hereby certify that upon the hearing of the said cause, the plaintiff in error, J. G. Davis, relied upon for defense that in disposing of picture frames in the manner and under the circumstances shown by the record, he was engaged in Interstate Commerce, and that Section 50 of an Act of the Legislature of Virginia, amended and approved May 13, 1903, providing for a peddler's license, in so far as is sought to impose a license on him for so disposing of said frames was unconstitutional and void, said Act being in conflict with, and contrary to Article 1, Section 8 of the Constitution of the

United States, and the said J. G. Davis further relied for defense that he was not a peddler within the purview of said Act; that no other defense was interposed by the said J. G. Davis; that said J. G. Davis was convicted in the Corporation Court of the City of Newport News for selling or disposing of picture frames, without taking out a license therefor, contrary to law, and on appeal by the said J. G. Davis to this Court, the judgment of conviction of

11 said Corporation Court of the City of Newport News was affirmed on the merits, this Court deciding that the disposing of the frames, in the manner and under the circumstances disclosed by the record did not constitute Interstate commerce, and was not in conflict with, or contrary to, Article 1, Section 8 of the Constitution of the United States, and that the plaintiff in error was a peddler within the purview of the aforesaid Act of the Legislature of Virginia.

And I further certify that this, the said Supreme Court of Appeals of Virginia, in which final judgment was rendered against the said plaintiff in error, J. G. Davis, is the highest Court in which a decision of said cause can be had in the State of Virginia.

Signed this 4 day of December, 1912.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

12 [Endorsed:] J. G. Davis vs. Commonwealth. Certificate of President of Supreme Court of Appeals of Virginia. John Winston Read, Attorney at Law, Newport News, Virginia.

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of Appeals of the State of Virginia:

Because in the record and proceedings, as also the rendition of a judgment in a plea which is in the said Supreme Court of Appeals of Virginia, before you, at the June sitting of the June term, 1912, thereof, between the Commonwealth of Virginia, plaintiff, versus J. G. Davis, defendant, a manifest error has happened, to the great damage of the said defendant, J. G. Davis, as by his complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this December 4, 1912.

Done in the City of Richmond, with the seal of the District Court of the United States for the Eastern District of Virginia attached.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk District Court of United States,
Eastern District of Va.

Allowed:
JAMES KEITH,
President of the Supreme Court of Appeals of Va.

14 (Copy.)

J. G. DAVIS, Plaintiff in Error,
vs.
COMMONWEALTH OF VIRGINIA, Defendant in Error.

Know all men by these presents, that we, J. G. Davis, as principal, and American Surety Company of New York, as surety (the said Surety Company being authorized to do business in the State of Virginia), are held and firmly bound unto the State of Virginia in the just and full sum of Two Hundred Dollars ($200.00), for the payment of which well and truly to be made and done, we bind ourselves, our heirs, *exec-* executors, administrators, and assigns, jointly, severally, and firmly by these presents.

In testimony whereof, the said J. G. Davis has hereunto affixed his hand and seal, and the said American Surety Company of New York has caused these presents to be signed, and its corporate seal hereunto affixed, by its duly authorized officers, this 1st day of February, 1913.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above styled cause by the Supreme Court of Appeals of Virginia,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

J. G. DAVIS. [SEAL.]

[American Surety Company of New York.]

AMERICAN SURETY COMPANY OF NEW YORK,
By J. A. WILLETT,
Resident Vice-President.

Attest:
ALLAN D. JONES,
Resident Assistant Sec'ty.

15 STATE OF NEW YORK,
County of Onandaga, ss:

I, Myron J. Hayden, a Notary Public, in and for the County of Onondaga, and State of New York, do certify that James G. Davis, whose name is signed to the foregoing writing, has acknowledged the same before me in my county aforesaid.

Given under my hand and seal this 28th day of December, 1912.

[Seal Myron J. Hayden, Notary Public, Onondaga County, N. Y.]

MYRON J. HAYDEN,
Notary Public, Onondaga County, N. Y.

STATE OF NEW YORK,
County of Onondaga, ss:

I, Henry S. Whitney, Clerk of the County of Onondaga, and of the Supreme and County Courts therein, the same being courts of record, do hereby certify that Myron J. Hayden whose name is subscribed to the Certificate of the proof *or* acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof of acknowledgment, a Notary Public, in and for the County of Onondaga, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof *or* acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County, the 11th day of Feb. 1913.

[Seal Onondaga County.]

HENRY S. WHITNEY, *Clerk.*

VIRGINIA,
City of Newport News, To wit:

I, J. W. Read, a Notary Public for the City aforesaid, in the State of Virginia, do hereby certify that J. A. Willett, Resident Vice-President of the American Surety Company of New York
16 and Allan D. Jones, Resident Assistant Secretary of the American Surety Company of New York, whose names are signed to the writing hereto annexed, bearing date the 1st day of February, 1913, have acknowledged the same before me in my City aforesaid.

Given under my hand this February 15, 1913.

J. W. READ,
Notary Public.

Commission Expires September 1, 1915.

Endorsed: Bond received & filed February 17, 1913. H. L. J.

17 Copy.

Bond approved, and to operate as a supersedeas.
February 19th, 1913.
(Signed) JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

18 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Virginia:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of the State of Virginia, wherein J. G. Davis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said palintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness, the President of the Supreme Court of Appeals of the State of Virginia this the 19th day of February, 1913.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Attest:
H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

Service accepted this the 19th day of February, 1913.
SAM'L W. WILLIAMS,
Attorney General of Virginia.

19 DAVIS
v.
COMMONWEALTH.

(Wytheville, June 13, 1912.)

Error to Corporation Court of City of Newport News.

Per Curiam:

Upon practically the same facts, the questions presented by this record were determined in the case of Roselle v. Commonwealth, 110 Va. 235, 3 Va. App. 599, adversely to the appellant and favorably to the Commonwealth. That decision has since been affirmed by the Supreme Court of the United States, and for the reasons there given (110 Va. 235) the judgment here complained of must be affirmed.

20 386.

DAVIS
v.
COMMONWEALTH.

Record, No. 527.

From the Corporation Court of the City of Newport News.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 16, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, *Clerk*.

21 In the Supreme Court of Appeals of Virginia, at Richmond.

J. G. DAVIS
v.
COMMONWEALTH OF VIRGINIA.

To the Honorable the Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, J. G. Davis, represents that he is aggrieved by a final order and judgment of the Corporation Court for the City of Newport News, entered on the 28th day of April, 1911, affirming a judgment of the Police Court, where he was found guilty of peddling without a license and a fine assessed against him for $100.00 and costs. A transcript of the record of the proceedings and of the judgment therein is herewith exhibited.

Your petitioner is advised and represents to your Honors that the said judgment is erroneous in the particulars, namely:

1. That he is not a peddler as is defined by the Statute of Virginia, Pollard's Code, 1904, Cl. 50, p. 3223.

2. A license tax by the State, in accordance with the evidence (Record p. 11, "Exhibit A") is an interference with interstate commerce.

Under the first assignment of error, one who sells by order
22 or sample but does not deliver the article sold at the time of the sale is not considered a peddler, nor a person taking orders for goods to be manufactured by the principal. Elgin v. Picard, 24 Ill. App. 430; Chicago Portrait Co. v. City of Macon,

147 Fed. 967; Spencer v. Whiting, 68 Iowa 678 (28 N. W. 13), U. S. in Re Flinn 37 496. In Kloss v. Commonwealth 103 Va. 864, it was held that a sale by sample does not constitute peddling where there is no delivery, irrespective of whether the subsequent delivery is made by the seller or another. See also Potts v. State, 45 Tex. Cr. 45, 74 S. W. 31 and State v. Frank, 130 N. C. 724 (41 S. E. 785).

The case of Kennedy v. People, 9 Colo. App. 490 (40 Pac. 373), is strongly in point and says, "A person who is employed at a salary to sell goods by sample for his principal, and who takes orders for future delivery and carries his samples with him in a wagon, both being the property of the principal, and who afterwards delivers the goods upon their being shipped to him is not a peddler."

A person who contracts to sell pictures, and subsequently delivers to purchaser upon receipt of price agreed upon beforehand, is held not to be a peddler, Greensboro v. Williams, 124 N. C. 167 (32 S. E. 492).

The written order marked "Exhibit A" is no more than evidentiary of a previous or contemporaneous agreement between the agent soliciting the order and the customer, who has the option (South Carolina v. Coop, 52 S. E. 508) to subsequently buy a frame at price named, manufactured to correspond with the style and size of portrait. Whatever inferences might be drawn at the time the delivery agent delivers and collects should resolve in favor of the legitimate way the Empire Art Institute has of carrying on its business, showing to each customer perfect fairness by giving him an option to buy a frame and the privilege of examination.

Your petitioner begs to respectfully differ with the lower Court in his written opinion when he says (which seems to be an inference outside the record), "The sale of frames does not seem to be merely occasional, when three frames are carried around with each portrait at the time of its delivery. *In order* to then and there allure the customer into a purchase, if possible, may it not be that
23 *experience* of the concern carrying on this business has taught it that it is easier to get a contract for the sale of a portrait than of a portrait and frame, and that when a *satisfactory* portrait (how about a satisfactory frame) is delivered, it is not a very difficult matter for a *shrewd agent* to sell a frame as well, and probably one much more expensive than the portrait. (Record page 5), underscoring and language in parenthesis mine. Quoting futher from the opinion, "At the time when the order for the portrait is taken, it is evident from "Exhibit A" of the statement of facts that there is neither a sale nor a semblance of a contract for a frame."

Quere. Does it appear anywhere in the evidence as to the verbal transactions and agreements of the soliciting agent and any representations made at the time of taking the order, except the supplementary terms of "Exhibit A?"

None whatever.

The Court might well contend if the order was simply for the enlargement of a photograph without any pre-existing arrange-

ments for a picture or option as it were for a frame, there might be some question of the agent being a peddler, but that is not the case here, as is viewed by your petitioner, for "Exhibit A" makes the order binding on the part of the Empire Act Institute to sell a frame provided the customer decides to select one when the portrait is delivered.

Suppose the Empire Art Institute should refuse to sell a frame in accordance with the agreements entered into in "Exhibit A," would the customer be legally bound to take the portrait without the frame? I think not. Because one of the general rules of construction which govern the interpretation of a contract is that "The intention of the parties is to be collected from the whole agreement, Clark on Con. p. 589 (Hornbook Series); and further says, Anson on Con., "It may happen that the parties to a contract have not put all its terms into writing. Evidence of the supplementary terms is then admissible, not to vary but to complete the written contract." There is no positive evidence as to the oral representations made at the time the order was given, but the Court draws inferences of what may or may not have transpired and that presumption seemed to have held sway in the case of State v. Montgomery, 43 Atl. 15, which is the only authority (your petitioner can find regardless of what may be the opinion of the ma-
24 jority Court in case of Crystal v. Mayor, etc., City of Macon), which sustains the view of the lower Court, nor does this case (supra) seem to have gone to the Supreme Court of the United States.

Quoting from Judge Barham, p. 8, "The case of Chryst — al. v. Mayor, etc., City of Macon, decided by the Supreme Court of Georgia, in 1899 (2 Munic. Corp. Cas. 445), is another case directly in point as to the nature of this transaction, whether the sale of the portrait is a separate and distinct transaction from the sale of the frame, so as to constitute doing business in the State, and whether the imposition of a license tax on such sale of frames is in violation of the commerce clause of the Federal Constitution. Crystal was one of the agents of the Chicago Portrait Co., a non-resident, transacting business in the City of Macon, in the State of Ga., under facts substantially the same as, if not identical with, those involved in the State of S. C. v. Coop; State v. Montgomery, supra, and the case at bar."

This same case (Chrystal v. Mayor, etc., City of Macon), supra, also came up in the Federal Court in injunction proceedings (Reported 147 Fed. Rep., 967). Judge Speer in delivering his opinion says: "The Chicago Portrait Company, a corporation of the State of Illinois, brings its bill against the Mayor, etc., City of Macon, and asks an injunction — the inforcement of a tax upon the Complainant's agent upon the ground that such enforcement is repugnant to Article I, section 8, par. 3 of the Constitution of the U. S. W. L. Chrystal was one of the complainant's agents. His case was taken as typical of the others and the case submitted upon the following agreed upon facts:"

Therefore, since Judge Barham has admitted the facts to be

directly in point as to the nature of this transaction and as he says in his opinion is "On all fours" with the case at bar, your petitioner desires herewith to insert the agreed state of facts from the opinion of Judge Speer:

"Crystal was a non-resident of the State of Georgia. The Chicago Portrait Company was a corporation of Chicago, Ill., with its principal office and place of doing business in Chicago. Crystal was a special agent of the Chicago Portrait Company and had been sent to Macon for the purpose of delivering certain pictures
25 to customers who had ordered pictures enlarged. That such pictures were enlarged in Chicago, and after they were finished they were consigned to the Chicago Portrait Company in bulk at Macon, Ga., for said customers, and were received by Crystal as an agent of the Chicago Portrait Company for the purpose of delivering the same to the parties who had ordered them and receiving the pay therefor at the contract price. That such pictures were the property of the Chicago Portrait Company, until the same had been received and paid for by the respective customers who had ordered the picture, the same was shipped back to said company.

That each and every customer had the privilege of receiving his picture framed or unframed, and had a choice between frames of different prices. That the orders for said pictures had been previously taken by other agents of the Chicago Portrait Company and forwarded, with the pictures to be enlarged, to Chicago, where the work of enlargement was to be done, and that Chrystal had been sent to Macon to make delivery of and to collect for said work and was engaged at the same at the time he was arrested."

Your petitioner fully agrees with Judge Barham in regards to the facts of this case being identical with the case at bar. You can hardly find a case more directly in point, yet Judge Speer, says "It is said, however, that the sale of the picture frames by delivering agents will make them peddlers. It is not discoverable from the evidence submitted that the delivery agents sell the frames. The language is: "Each and every customer had the privilege of receiving his picture framed or unframed, and take his choice between frames of different prices." But, if this can properly be construed to indicate that the delivery agent is engaged in selling the frames, there is, nevertheless, high authority to negative this theory of the defendant. The Supreme Court of South Carolina, in the case of State v. Coop, 30 S. E. 609, 41 L. R. A. 501, Mr. Justice Gary delivering the opinion, held that the sale of the frame is a mere incident to the business in which appellant was regularly engaged and the frame may properly be regarded as part of or incident to the picture. "This case," the learned Justice remarks, "does not fall either within the letter or spirit of the statute against hawkers and peddlers, and, even if the statute could be construed to embrace cases like this, it would be unconstitutional on
26 the ground of interference with interstate commerce." The plaintiff in error in whose favor the decision was made in that case was one of the agents of the complainant here For these

reasons the injunction sought by the complainant will be granted."

Chief Justice Shaw of Massachusetts, in the case Com'th v. Ober, 12 Cush. 493, says:

The leading primary idea of a hawker and peddler is that of an itinerant or travelling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers in contradistinction to a trader who has goods for sale and sells them in a fixed place of business.

Judge Lewis, in case of Harris v. Com'th, 81 Va. 240, 243, says: "No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and letter of the statute imposing such penalty," and the same principal is *an*nunciated by the present Court, for says Judge Buchanan: "It was conceded by the Attorney-General in oral argument and properly so, that the business in which the plaintiff in error was engaged was not within the spirit of the act in question. Nor do we think that it is clearly within the letter of that law. Kloss v. Com'th, 103 Va. 864.

Therefore, it seems clear to your petitioner that Kloss v. Com'th, supra,, South Carolina v. Coop, so often referred to, Chicago Portrait Company v. Mayor, etc., City of Macon, 147 Fed. Rep. 967, and other cases in point, see vol. 25 Cent. Dic. Hawkers and Peddlers, sections 3-6, is conclusive of the question raised.

As to the second assignment of error, your petitioner briefly contends that to prevent him from fulfilling the orders heretofore solicited in accordance with the facts set out is an interference with interstate commerce.

State of North Carolina v. Caldwell, 187 U. S. 622 and authorities there cited.

And the general proposition has been time and again announced by the decisions of the United States Supreme Court. The weight of authority, as to cases of similar nature, holds that a license
27 tax by the State is an interference with interstate commerce. Sabine Robbins v. Taxing Dist. Shelby Co., Tenn., 120 U. S. 489; Crutcher v. Kentucky, 141 U. S. 47; Lyng v. Michigan, 135 U. S. 161.

The judgment should be set aside as being contrary to the law and the evidence.

And your petitioner further represents that the said judgment is in other respects uncertain, informal and erroneous.

Your petitioner therefore prays that a writ of supersedeas may be awarded to him in order that the said judgment for the causes of error aforesaid, before you may be caused to come, that the whole matter in the said judgment contained may be reheard, and that the judgment may be reversed and annulled.

And your petitioner will ever pray, etc.

J. G. DAVIS,
By T. J. CHRISTIAN,
Attorney for Plaintiff in Error.

I, J. Winston Read, an Attorney practicing in the Supreme Court of Appeals of Virginia, hereby certify that in my opinion there is

error in the judgment of the Corporation Court of the City of Newport News, in favor of the Commonwealth of Virginia against J. G. Davis, as set forth in the foregoing annexed petition, for which the same should be reviewed by the Supreme Court of Appeals.

J. WINSTON READ, *Attorney.*

Received May 24, 1911.
R. H. C.

Writ of error and supersedeas; Bond $200.00.

R. H. CARDWELL.

To Clerk of Su. Ct. of Appeals, Richmond, Va.

28 VIRGINIA:

Pleas before the Corporation Court of the City of Newport News, at the Court-house Thereof, on Friday, the 28th Day of April, in the Year One Thousand Nine Hundred and Eleven.

Be it remembered, that heretofore, to wit: on the 17th day of April, 1911, on complaint and information on oath, a warrant was issued by B. B. Semmes, Acting Police Justice for said City against one J. G. Davis; which said warrant with the judgment of the Acting Police Justice endorsed thereon is in the following words and figures, to wit:

STATE OF VIRGINIA,
City of Newport News, to wit:

To any or all of the Constables of the said City:

Whereas, A. C. Fisher of the said City has this day made complaint and information on oath before me, B. B. Semmes, Acting Police Justice of said City, that J. G. Davis of the said city on the 17th day of Apr., 1911, in said city did carry from place to place, merchandise, to wit: picture frames, and did offer to sell or barter the same, and did actually sell or barter the same, without having first obtained a license as a peddler. These are therefore, in the name of the Commonwealth, to command you forthwith to apprehend and bring before the Police Justice of the said city the body of the said J. G. Davis to answer the said complaint, and to be further dealt with according to law. Given under my hand and seal this 17th day of Apr. in the year 1911.

B. B. SEMMES,
Acting Police Justice.

(*Judgment of Acting Police Justice Endorsed on Back of said Warrant.*)

Upon examination, I find the defendant guilty of peddling and assess against him a fine of $100.00 and $2.75 costs.

B. B. SEMMES,
Acting P. J.

29 And at another day, to wit: At a Corporation Court continued by adjournment and held for the City of Newport News, at the court-house thereof, on Saturday, the 22nd day of April, in the year, One Thousand Nine Hundred and Eleven.

COMMONWEALTH, Appellee,
vs.
J. G. DAVIS, Appellant.

On an Appeal from the Judgment of the Police Justice of this City on a Warrant for Peddling and Selling Merchandise without a License: A Misdemeanor.

This day came the attorney prosecuting for the Commonwealth as did also the said J. G. Davis, in his own proper person and by his attorney, and by consent of the attorney for the Commonwealth and the appellant, by his attorney and in person, it is ordered that this warrant be forthwith docketed for trial and determination. Thereupon, the said appellant pleaded not guilty to said warrant and said plea being tendered in person by the said J. G. Davis and with his consent and with the consent of the attorney prosecuting for the Commonwealth, both said consents being now entered of record, the court proceeded to hear and determine this case without the intervention of a jury; and the evidence and arguments of counsel being fully heard, and the court not being fully advised as to the judgment to be given herein, time is taken until the 28th day of April, 1911, to consider thereof. Whereupon, the said J. G. Davis, together with W. V. Conrad (who *justified* on oath as to his sufficiency), his security, here in open Court acknowledge themselves to be severally indebted to the Commonwealth of Virginia, in the sum of two hundred and fifty dollars each, of their respective goods and chattels, lands and tenements to be levied and to the use of the Commonwealth rendered, hereby waiving the benefit of their respective homestead exemptions as to this obligation and also waiving any claim or right to discharge any liability to the Commonwealth arising under this recognizance, or by virtue of said office, post or trust, with coupons detached from the bonds of this State. Yet upon this condition, that if the said J. G. Davis shall personally appear here before this Court on the 28th day of April, 1911, to answer a warrant against him for a
30 misdemeanor, to wit: selling merchandise without a license, shall surrender himself into custody and shall not depart thence without the leave of the Judge of this Court, then this recognizance to be void, otherwise to remain in full force and virtue.

And now at this day, to wit: being the day and year first herein written at a corporation court continued by adjournment and held for the City of Newport News, at the court house thereof, on Friday, the 28th day of April, in the year, One Thousand Nine Hundred and Eleven.

COMMONWEALTH, Appellee,
v.
J. G. DAVIS, Appellant.

On an Appeal from the Judgment of the Police Justice of this City on a Warrant for Peddling and Selling Merchandise without a License.

This day came again the attorney prosecuting for the Commonwealth and the said J. G. Davis appeared in Court in partial discharge of the recognizance entered into by him in this Court on the 22d day of April, 1911, and the Court being fully advised as to its judgment to be given herein, doth find the accused guilty as charged in said warrant and doth assess against the said J. G. Davis a fine of $100.00. Therefore, it is considered by the court that the Commonwealth recover against the said J. G. Davis the sum of one hundred dollars, the fine against him assessed as aforesaid, and its costs by it about its said warrant and this appeal in this behalf expended. To the assessing of said fine and entering judgment therefor, the said J. G. Davis, by counsel, excepted And at the instance of the said J. G. Davis, by counsel, who desires to present to the Supreme Court of Appeals of this State a petition for a writ of error and supersedeas to the judgment aforesaid, the execution of said judgment is postponed until the 12th day of June, 1911. And it is ordered that the Court's written opinion in this case be made a part of the record herein and to be included in the transcript hereof.

The Court's written opinion herein is in the words and figures following, to wit:

31 COMMONWEALTH
v.
J. G. DAVIS.

On a Charge of Peddling in the City of Newport News Without a License.

The question for determination by this Court upon the certificate of facts filed is (1) Whether the defendant was doing the business of a peddler within the meaning of the Virginia Statute, it being conceded that he had no such license as that statute requires; (2) Whether it would be such an interference with interstate commerce to apply our peddlers' statute to the business carried on by the Empire Art Institute, through its agents, such as the defendant, as would render the Statute unconstitutional as to such business. A definition of a peddler which is sufficient for this case is to be found in the opening sentence of cl. 50, p. 2223, Pollard's Code, 1904: "Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, &c." It is plain under the facts of this case that so far as the taking and filling of orders for the enlarging of portraits, including their delivery

is concerned, it does not constitute peddling as above defined, and is interstate commerce, coming within the purview of the "sales by sample" cases. But can this be said of the sale of portrait frames? I think not. At the time when the order for the portrait is taken, it is evident from "Exhibit A" of the statement of facts that there is neither a sale nor a semblance of a contract for a sale of a frame. The agent has not even with him then a sample of the frame which may or may not afterwards be purchased; for the agent who delivers the portrait exhibits three frames from which the purchaser may select, while the agent who takes the order for the portrait only shows one frame, viz: that in which he carries his sample portrait. Then, the sale of a frame takes place, if ever, after the order for the portrait has been given, and the work upon the same done, and the portraits along with the frames have reached this City and become part of the mass of property located in this State, and after the defendant, in this State, has carried the frames from house to house and offered them to his customers, taking chances as to whether a customer would buy any at all, and if so, which one.

This seems plainly to constitute peddling under our statute.

32 And it does not seem to be interstate commerce, for the defendant's principal has chosen to ship its frames without any contract for their purchase to itself at the City of Newport News; and then from its depository, temporary though it be, to carry them from place to place and offer the very thing so carried about for immediate sale and delivery. It seems to me that such non-resident trader clearly submits its picture frames and its business of peddling them for sale to the Police Power of the State of Virginia. And the Court knows of no class of cases in which the average citizen needs more the protection of the police power of the State. The Court is aware that there is a case decided by the majority of the Court in the Supreme Court of S. C. in 1898, reported in 41 L. R. A. 501 (State of South Carolina v. Coop), where a contract of the Chicago Portrait Co. similar in most of its essential particulars with "Exhibit A" of this record, is interpreted the majority of the Court held that the business carried on under the contract was not peddling, but was selling by sample, and that the sale of the frames was merely incidental to the sale of the pictures and occasional, and was permissible; that any other interpretation upon the contract and transaction would be violative of the Federal Constitution. If the sale of frames is merely incidental to the sale of portraits, and occasional. I can see how it might be considered interstate commerce like the sale of the portrait. But I cannot agree with a majority of the Court, if they would so hold on the facts before me, that picture frames which sell for from $3.00 to $5.00 are merely incidental to the sale of portraits which sell for from $1.98 to $3.96. The sale of frames does not seem to be merely occasional when three frames are carried around with each portrait at the time of its delivery in order to then and there allure the customer into a purchase, if possible. May it not be that the experience of the concern carrying on this business has taught it that it is easier to get a contract for the sale of a portrait than of a portrait and

frame, and that when a satisfactory portrait is delivered, it is not a very difficult matter for a shrewd agent to sell a frame as well, and probably one much more expensive than the portrait? The dissenting opinion of Jones J., in the case of the State of South Carolina v. Coop, supra, seems much more in accordance with the true facts of the case and in accordance with sound reason than the majority opinion, and expresses so well the views of this
33 Court as to the case at bar, that the language of Jones J. is here adopted. "The sale of picture frames was not occasional or exceptional merely, but is the general scope of the defendant's business. It was a part of the defendant's business to sell picture frames to any and every customer who had given an order for a portrait. These frames were not sold by sample, or pursuant to an order solicited, but were carried about from place to place within this State, and sold or offered for sale for a price separate and distinct from the price of the portrait ordered. The fact that the frame was convenient for the use, protection and enjoyment of the portrait can make no difference in determining the question whether picture frames "come within the definition of goods, wares and merchandise, and whether carrying them from place to place constitutes hawking and peddling." In the year 1899, a case directly in point was decided by the Supreme Court of the State of Maine (State v. Montgomery, 43 Atl. 13.) The same Chicago Portrait Co. was the real defendant in that case. The charge against the defendant was peddling pictures and picture frames without a license. The language of the Court in that case is so appropriate to the case at bar that it is here quoted in part at p. 14: "It is not claimed," says the Court, "that the facts agreed upon do not constitute an offense within the meaning of the Statute." The Court then relates the agreed facts which are in every essential circumstances "on all fours" with those of the case at bar; and then continues "We think the acts of the defendant were sufficient to constitute the crime of peddling *picture frames* (italics mine) without a license. He went from place to place in Farmington (Newport News). He carried these picture frames. He exposed them for sale. They were not within the exceptions in the Statute. He had no license. Here seem to be all the elements of the Statute offense. The fact that the frames were appropriate for the pictures which had been ordered, or that the pictures when delivered were encased in frames, can make no difference. It is the same as if they were exposed separately, or at any other time. The frames had not been previously ordered. The customers had made no previous contract to purchase picture frames. The selling or exposing for sale of picture frames was not incidental to the business of enlarging pictures, but was additional to it. The defendant had the frames in his possession to expose for sale and then to sell if he
34 could." This case was again before the same Court, but its opinion in this matter was in no way affected by the subsequent opinion. The case of Chrystal v. Mayor, etc., City of Macon, decided by the Supreme Court of Georgia, in 1899 (2 Munic. Corp. Cas. 445), is another case directly in point as to the nature of this

transaction, whether the sale of the portrait is a separate and distinct transaction from the sale of the *farme*, so as to constitute doing business in the State, and whether the imposition of a license tax on such sale of frames is in violation of the commerce clause of the Federal Constitution. Chrystal was one of the agents of the Chicago Portrait Co., a non-resident, transacting business in the City of Macon, in the State of Ga., under facts substantially the same as, if not identical with, those involved in the State of S. C. v. Coop; State v. Montgomery, supra, and the case at bar. Chrystal claimed that the imposition of a local license tax upon him for his transactions in the City of Macon would be violative of the Federal Constitution, as to the regulation of Commerce between the States. Presiding Judge Lumpkin wrote the opinion for the whole Court, in his usually clear and convincing style, which would be quoted at length but for its prolonging this already lengthy opinion. But I cannot resist the quotation of a few words from that opinion, which are: "So far as the business related to the sale of picture frames, it was certainly outside the scope and operation of the above mentioned clause of the United States Constitution." * * * "The mere fact that at the time of ordering the picture the customer may have reserved the right to select and buy a picture frame is of no consequence whatever. Nor does it matter that the so-called privilege of purchasing picture frames from this Company was exclusively in those who had ordered pictures." * * * "It was argued that a portrait and its frame were so intimately connected that both together really constituted a unit or single thing. This may be quite true, after a portrait is placed in a frame; but, manifestly, until this has been done, they are separate and distinct things, each having its own independent commercial value, and the scheme of the very business under discussion distinctly recognizes that it is so. The Company unquestionally sells portraits without selling frames; and, when it does sell a frame, that is a complete transaction, in and of itself." Held: So far as respects the sale of frames, this is a Georgia business, pure and simple, and has no interstate feature.

Judge Lumpkin stated that the Court had no difficulty in
35 reaching this conclusion. In the case at bar. The Empire Art Institute, judging from the terms of "Exhibit A," uses its best endeavors to leave the customer ordering a picture under the impression that he has done nothing by signing the order blank which in any manner commit him to the purchase of a frame. In the minority opinion in State of South Carolina v. Coop, supra, and that the law as thus stated is decisive of the case at bar in favor of the Commonwealth's contention. In coming to this conclusion I am not unmindful of the decision of the Supreme Court of the United States in the case of State of North Carolina v. Caldwell (187 U. S., 622), in which the Supreme Court of N. C. was reversed, the latter Court having held that the same Chicago Portrait Company, a non-resident was liable to the imposition of a local tax for doing business through its agent, the defendant in Greensboro, the reversal of the said State Court by the U. S. Supreme Court being upon the ground that the imposition of such a tax was an interfer-

ence with interstate commerce. But the facts in that case were that defendant came to Greensboro to deliver and was delivering certain pictures and frames for which contracts of sale had previously been made by other employees at previous times. The facts found made no distinction between the pictures and the frames. It is therefore ordered that the judgment of the Police Court of the City of Newport News finding the defendant, J. G. Davis guilty of peddling picture frames in said City without a license and assessing against him a fine of $100.00 be, and the same hereby is, affirmed. Let judgment be entered up accordingly.

T. J. BARHAM, *Judge.*

Defendant's Bill of Exception No. 1 is as follows, to-wit:

Exception No. 1.

COMMONWEALTH OF VIRGINIA, Plaintiff.

v.

J. G. DAVIS, Defendant.

Be it remembered that upon the trial of this case the facts proven were as follows:

36 The Empire Art Institute, a non-resident with its principal office and place of business at Syracuse, N. Y., is engaged in the art and picture business, including the enlarging of photographs, and in carrying on the business, is in the habit of sending its agents throughout the various States of the Union, including the State of Virginia, soliciting orders for the enlargement of photographs, each agent carrying with him a sample of his principal's portrait work, in a frame and this is the only frame carried and exhibited by him at the time. The agent solicits and obtains such orders for the enlargement of portraits as he can get, taking these orders upon uniform order blanks furnished him by his principal, which evidence the transaction at the time between the principal and the customer as to the portrait and frame, which is in the following words and figures, and marked "Exhibit A."

"EXHIBIT A."

India Ink $1.98.
(Unframed.)

Water Color $3.96
(Unframed.)

Indp. Phone 288.

Empire Art
Institute.

Aquarel.

Specialty.
Paintings.

The School of Art.
Groups Extra.
Aquarell Painting.

218 E. Washington St.
Syracuse, N. Y.

Value $10.00.

To introduce this new Aquarell Portrait we will place a limited number in your neighborhood at cost of material, India Ink $1.98 and Water Color $3.96. Groups extra.

On or about Apr. 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait — x — as shown by our salesman, Mrs. T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from
37 us but owing to the delicate nature of the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices.

Please remember date of delivery and have the money ready as our deliverymen can make but one call to collect charges for same. Please be at home or leave money with nearest neighbor.

(Signed) C. D. ANDERSON,
Empire Art Institute.

These orders are turned in by the agent to the home office, there the photographs are enlarged. That office then ships in bulk to itself at the point of delivery the portraits which have been ordered, along with a supply of frames, suitable for said portraits; the portraits not being shipped in frames. After the arrival of the portraits and frames at the point of delivery, the Empire Art Institute's Agent (being some other person that he who solicited the orders) sent by them for the purpose, pays the freight on the goods, receives them from the transportation company, takes them into his possession to some temporary place of storage, where he breaks the bulk, puts the pictures in to appropriate frames and proceeds with such reasonable expedition as he can to deliver the portraits to those who have heretofore ordered them at their several places of abode, collecting therefor the amounts due for same. At the same time, the same agent takes with him to the house of the customer in addition to the frame containing the portrait, two other styles of frames, all differing in prices as well, from which the customer to whom he delivers a portrait is offered the opportunity, at the time and place of such delivery to select and buy a frame

if he so desires, no attempt being made to sell a frame to anyone who has not previously given an order for a portrait. A number of orders for the enlargement of photographs was obtained by the said Empire Art Institute in the City of Newport News in the usual manner on order blanks identical with that above set out, the work done, and portrait, along with adequate and suitable supply of frames, shipped as above set out to this City. J. G. Davis, the defendant, as the said Institute's delivery agent, and at its direction, in the usual manner above indicated, came to this City, received and took charge of the goods consigned to his principal at this point, carried them to the livery stable and garage of
38 W. V. Conard in the City of Newport News, as a temporary place of safe-keeping until he, the defendant, should dispose of them in the usual manner set out. There the defendant proceeded, in the usual manner to open said bulk putting the pictures in appropriate frames for delivery. He then proceeded, in the manner above indicated from day to day, to deliver the portraits to those in the City who had already ordered them, collecting therefor as he went; and at the same time, offered to each of the same customers to whom he was delivering a portrait, at their separate respective houses in said City, the opportunity of selecting and buying, in the manner above set out, any one of these frames, if he so desired, several of whom selected and paid defendant for a frame in this City at the same time he collected for the portrait. In the midst of the transactions of the defendant, just enumerated, he was arrested charged with peddling without a license. He had no peddler's or other license in this State. The prices quoted by the defendant to customers for frames in this City were $3.00, $4.00 and $5.00. He (Davis) has no property interest in the portraits or frames, but works for the Empire Art Institute for a salary and is himself a non-resident.

The foregoing are the facts and all the facts proven upon the trial of this case; which trial was within thirty days last past from this date.

And thereupon, the Court by consent of parties having heard all the evidence, including "Exhibit A" introduced in this case, and the argument of counsel, rendered a judgment in favor of the Commonwealth of Virginia for a fine of $100.00 and costs against the defendant, as stated in the record.

To which ruling of the Court, and its judgment thereupon, the defendant then and there excepted and tenders this, his bill of exception, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done. Given under my hand and seal this 10th day of May, 1911.

T. J. BARHAM. [SEAL.]

STATE OF VIRGINIA,
City of Newport News, To wit:

I, D. G. Smith, Clerk of the Corporation Court of the City
39 of Newport News, in the State of Virginia, do hereby certify that the above and foregoing is a true transcript of so much

of the record and proceedings as required by law (no particular parts of the record being specially required to be copied by either party in writing) in a certain prosecution lately depending in the said Corporation Court, between the Commonwealth of Virginia, Appellee and J. G. Davis, Appellant. And I further certify that notice of the application for this transcript of record has been given as required by law and that said notice has been filed with the papers in said cause. Given under my hand this 19th day of May, in the year 1911.

D. G. SMITH, *Clerk,*
By R. E. MARABLE,
Deputy Clerk.

Fee of Clerk of Corporation Court of Newport News $7.00.

A Copy—Teste:
H. STEWART JONES, *C. C.*

40 SUPREME COURT OF APPEALS,
State of Virginia, ss:

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 21 inclusive, are a true, full and complete transcript of the record and proceedings, in the case of J. G. Davis against the Commonwealth of Virginia, and also of the opinion of the Court rendered therein, as the same appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 19th day of February, 1913.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the Said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 19th day of February, 1913.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court this the 19th day of Feb. 1913.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

Endorsed on cover: File No. 23,722. Virginia Supreme Court of Appeals. Term No. 184. J. G. Davis, plaintiff in error, vs. The Commonwealth of Virginia. Filed May 26th, 1913. File No. 23,722.

184

SUPREME COURT OF THE UNITED STATES

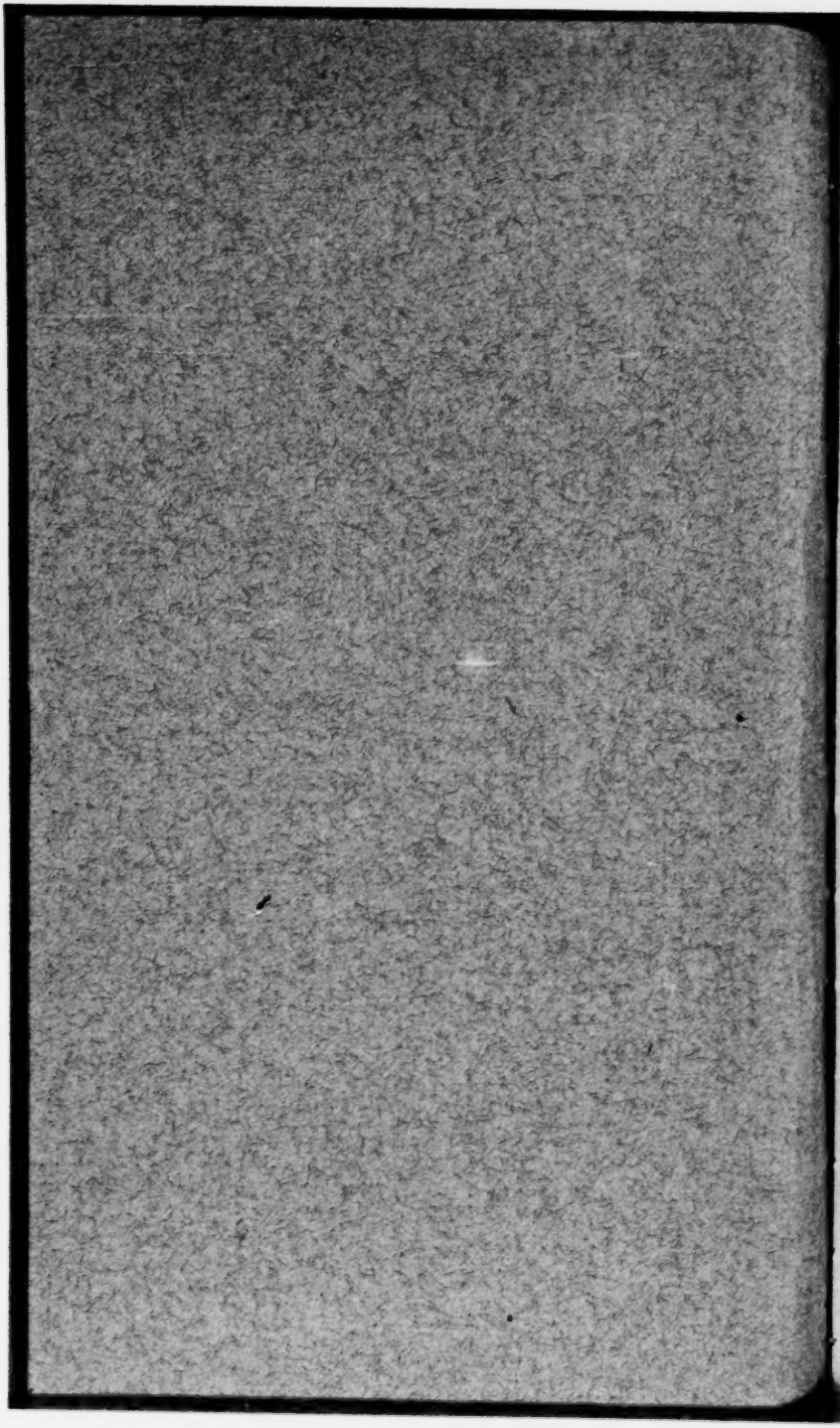
J. C. DAVIS, PLAINTIFF IN ERROR

—vs—

THE COMMONWEALTH OF VIRGINIA

In Error to the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.



SUBJECT INDEX

TABLE OF CASES

SUPREME COURT OF THE UNITED STATES

J. G. DAVIS, PLAINTIFF IN ERROR

—VS—

THE COMMONWEALTH OF VIRGINIA

In Error to the Supreme Court of Appeals of the State of Virginia.

STATEMENT OF CASE.

The plaintiff in error was convicted and sentenced to a fine of one hundred dollars ($100.00) and costs by the Corporation Court of the City of Newport News, Virginia, by its judgment entered on the 28th day of April, 1911, for alleged violation of Section 50, of an act of the Legislature of Virginia, approved May 13, 1903, which act is in the following words and figures:

"Any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles; and whenever a license is granted to a peddler to sell such

goods, wares, or merchandise, his license shall be valid for one year from date of its issue. Said license shall not be transferable, and any person so licensed shall endorse his name on the said license, and such license shall confer authority to sell at any house or place within the county or city in which the license was granted. Any peddler who shall peddle for sale or sell or barter without a license shall pay a fine of not less than one hundred dollars nor more than five hundred dollars for each offence, one-half of which shall go to the informer; and any person selling or offering to sell as a peddler shall exhibit his license on demand of any citizen of the county, city or town in which he sells or offers to sell or barter; and upon his failure or refusal to do so he shall be subject to the penalties of peddling without a license. This section shall be construed to include persons engaged in peddling lightning rods. All persons who do not keep a regular place of business (whether it be in a house, on a vacant lot, or elsewhere), open at all time in regular business hours, and at the same place, who shall offer for sale goods, wares, and merchandise, shall be deemed peddlers under this act. And all persons who keep a regular place of business open at all times in regular business hours, and at the same place, and who shall personally, or through their agents, offer for sale, or sell, and at the time of such offering or sale, deliver goods, wares, and merchandise, elsewhere than at such regular place of business shall also be deemed peddlers as above; but this section shall not apply to those who sell or offer for sale, in person or by their employees, ice, fuel, meats, fowls, fish, game, vegetables, fruits, or other family supplies of a perishable nature grown or produced by them; nor to merchants who keep a regular place of business open at all time in regular business hours and at the same place, without a city or town, who shall sell such articles

to merchants only residing and doing business in a city or town."

One C. D. Anderson is a travelling-salesman, employed by The Empire Art Institute, a non-resident of the State of Virginia, with its principal office and place of business in the City of Syracuse, New York. The Empire Art Institute is engaged in the Art and Picture business, including the enlarging of photographs and the manufacture of picture frames.

The said Anderson solicited orders in the City of Newport News without paying the license tax required by the foregoing act. These orders were given in writing, for a portrait of the size and kind wanted, specified the price, cash on delivery, and among other provisions, contained the following:

"We do not compel you to take frames from us, but owing to the delicate nature of the work all portraits are delivered in appropriate frames, which this ticket entitles you to select at wholesale prices."

One of the orders actually taken by the agent in this case is in the following words and figures:

"EXHIBIT A."

India Ink, $1.98. (Unframed)

Water Color, $3.96. (Unframed)

Indp. Phone 288

EMPIRE ART INSTITUTE

Specialty Paintings

The School of Art :: Groups Extra :: Aquarell Painting

218 E. Washington Street

Syracuse, N. Y.

Value $10.

To introduce this new Aquarell Portrait we will place a limited number in your neighborhood at cost of material, India Ink, $1.98 and Water Color, $3.98. Groups extra.

On or about April 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait .....x..... as shown by our salesman. Mrs. T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from us but owing to the delicate nature of the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices.

Please remember date of delivery and have the money ready as our deliverymen can make but one call to collect charges for same. Please be at home or leave money with nearest neighbor.

(Signed) C. D. ANDERSON,
Empire Art Institute.
(Record page 21)

Upon the completion of the work in Syracuse, the portraits and frames were shipped to Newport News, to

the plaintiff in error, another agent of the Empire Art Institute who had no permanent place of business in Virginia, who delivered the portraits and frames and collected for them pursuant to the contract aforesaid, having been sent to Newport News by said Institute for such purpose. While the portraits were delivered in appropriate frames, two other styles of frames were exhibited to the purchaser who was then given the right to make the selection referred to in the contract of purchase. No attempt was made to sell a frame to anyone who had not previously given an order for a portrait.

Neither the said Anderson nor the plaintiff in error had any property interest in the portraits or frames, but work for the Empire Art Institute for certain salaries and are non-residents of the State of Virginia. The portraits and frames remained the property of the Institute until paid for and delivered. (Record page 21-22). A writ of error was granted to the judgment of the Corporation Court for the City of Newport News by the Supreme Court of Appeals of Virginia and the Appellant Court sustained the conviction, on the ground that the sale of the frames was a wholly local matter. In the brief opinion of the Court (Record page 8) it is stated that for the reasons given in the opinion rendered in the case of Roselle v. Commonwealth, 110 Va. 235, the judgment of the Lower Court was affirmed. The Roselle case was afterwards taken to this Court where the decision of the Supreme Court of Appeals of Virginia was affirmed by a divided Court.

The said case will be hereinafter discussed under an appropriate heading.

QUESTIONS INVOLVED.

The questions involved are:

1. Whether the plaintiff in error, within the facts

of this case, was not engaged in interstate commerce.

2. Whether section 50 of an act of the Legislature of the State of Virginia, approved May 13, 1903, providing for a peddler's license (which act is above set out) as applied to this case is not a regulation of commerce among the States and void under the Constitution of the United States.

3. Whether the disposal of the picture frames in the manner and under the circumstances, described by the record did not constitute interstate commerce, and was contrary to Article 1, Section 8 of the Constitution of the United States.

4. Whether the plaintiff in error was a peddler within the purview of the aforesaid act of the Legislature of Virginia.

MANNER IN WHICH QUESTIONS WERE RAISED.

The manner in which these questions were raised is as follows:

The plaintiff in error was arrested in the City of Newport News, Virginia, charged with peddling without a license and with violating the above mentioned act of the Legislature of Virginia. He was tried by the Acting Police Justice of said city, found guilty and fined $100.00 and costs. (Record page 14). His case was appealed to the Corporation Court of the City of Newport News, Virginia, where the case was duly heard *de novo* and the plaintiff in error again convicted. (Record page 16). He thereupon carried his case to the Supreme Court of Appeals of Virginia, the highest court in the State, where the judgment of the Corporation Court of the City of Newport News was affirmed upon the merits. (Record page 8).

In each of the courts above mentioned, the plaintiff in error, by his counsel, insisted upon the matters of law herein set out in the specification of errors, but all of the said courts ruled adversely to such contentions, whereupon the case was taken to this Court. (Record pages 6 et seq.)

SPECIFICATION OF ERRORS.

The plaintiff in error submits that in the record and proceedings, and the judgment rendered in the Supreme Court of Appeals of Virginia, there is manifest error in this, towit, the Court erred:

1. In holding that plaintiff in error was not engaged in interstate commerce.

2. In holding that section 50 of an Act of the Legislature of the State of Virginia approved May 13, 1903, providing for a peddler's license, was constitutional.

3. In holding that the disposing of the frames in the manner, and under the circumstances, disclosed by the record did not constitute interstate commerce, and was not inconflict with, or contrary to, Article 1, Section 8 of the Constitution of the United States.

4. In holding that the plaintiff in error was a peddler within the purview of the aforesaid Act of the Legislature of Virginia.

5. In affirming the judgment of the Corporation Court of the City of Newport News, convicting plaintiff in error of a violation of Section 50 of the aforesaid Act of the Legislature of the State of Virginia.

ARGUMENT.

It is earnestly submitted that the law applicable to the facts of this case, has been settled by this Court in

the case of Dozier v. Alabama, 218 U. S. 124, 54 L. Ed. 965, 30 Sup. Ct. Rep. 649. It is conceded that there is a decided conflict of opinion among the State Courts, as to whether one who, in a transaction of interstate commerce, has made sale of a picture giving the purchaser the option of purchasing a frame to be delivered with the said picture, is within the protection of the commerce clause of the Constitution. It is not perceived that any useful purpose would be served by quoting at length from the cases, which will be found collected in notes to State v. Bayer 19 L. R. A. (N. S.) 297 and Dozier v. Alabama 28 L. R. A. (N. S.) 264. The facts as set out in the opinion of Mr. Justice Holmes in the Dozier case, are practically identical with the facts of this case. In the Dozier case the contract provided, "All portraits are delivered in appropriate frames which this contract entitles the purchaser to accept at factory prices." In this case the contract says, "We do not compel you to take frames from us but owing to the delicate nature of the work, all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices." The only difference between the two cases is, that in the one at bar, the purchaser is given the right of selection between three styles of frames, whereas in the Dozier case the purchaser apparently only had the right to accept or reject the one style of frame offered. Certainly the right to select and reject as between one and three frames can make no difference in principle between the two cases. Indeed such a distinction was expressly repudiated in the cases of Chicago Portrait Co. v. Mayor, etc., of the City of Macon 147 Fed. 967, and State v. Coop (S. C.) 41 L. R. A. 501 where a similar right of selection was given between frames of different style and price. At the time the order was received, the purchaser understood that he had this right of selection and the sale

of the frames was incidental to the sale of the pictures. The offer was part of the interstate transaction. It was agreed that the frame should be selected at wholesale prices. The frames were sent on with the pictures from Syracuse, New York and were offered when the pictures were tendered. No attempt was made to sell a frame to anyone who had not given an order for a picture.

The plaintiff in error had no place of business in the State of Virginia and his principal's place of business was in the City of Syracuse, New York. The picture and frames were sent to the agent and remained the property of the Company until paid for and delivered. In such case, the sale of the frames cannot be separated from the rest of the transaction so as to sustain the license tax.

Other cases in point are as follows:

Stewart v. Michigan (U. S. Supreme Court) decided Mar. 23rd, 1914; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; Chicago Portrait Co. v. Macon, 147 Fed. 967; State v. Coop, 52 S. C. 477, 41 L. R. A. 501; Laurens v. Elmore, 55 S. C. 477, 45 L. R. A. 249.

THE ROSELLE CASE.

It will be noted that the Supreme Court of Appeals of Virginia based its decision upon the case of Roselle v. Commonwealth 110 Va. 235, stating that the facts in both cases were practically the same. (Record page 8). In this we submit that the Court was in error. In the Roselle case the evidence showed that sales and delivery of frames were made to parties in the City of Charlottesville, Va., at the time of the delivery of portraits when no pre-

vious contract relative to such sales had been made. We quote from the opinion:

"J. M. Burch from whom an order had been secured was introduced as a witness on behalf of the Commonwealth and testified that he had given an order to the soliciting agent of the company for a portrait but that he had not ordered a frame; that the entire negotiation and sale to him of the picture frame, which he bought, was begun and concluded with the plaintiff in error at the time the portrait was delivered to him." And again, "The testimony of J. M. Burch, which must be taken as true, shows that the entire negotiation and sale of the picture frame which he bought was begun and concluded in Charlottesville, Va., where the frame was." Under the evidence of Burch, therefore, the frames were sold and delivered at the same time by an agent who had such frames in his possession.

Again the view of the law taken by the Virginia Court has been expressly repudiated by this Court in the Dozier case.

In the Roselle case it was held that the test to determine whether personal property sold is to be regarded as belonging to interstate or intrastate commerce, is whether or not the property which is the subject of the sale is within the jurisdiction of the State at the time the sale is made; and if within the jurisdiction of the State it is subject to State regulation.

This Court in the Dozier case, speaking through Mr. Justice Holmes, said in part, "No doubt it is true that the customer was not bound to take the frame unless he saw fit, and that the sale of it took place wholly within the state of Alabama, if a sale was made. But, as was hinted in Rearick v. Pennsylvania, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159, what is commerce among

the states is a question depending upon broader consideration than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices', and the company and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture. In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generally fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of the opinion that the sale of the frames cannot be separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it."

The judgment in the Roselle case was affirmed by this Court on March 18, 1912, by a divided Court. Roselle v. Commonwealth of Virginia 233 U. S. 716, 56 L. ed. 627. But we do not understand that the principles announced in the Dozier case were intended to be disapproved by the affirmance of the judgment in the Roselle Case. The decision of the Virginia Court was based upon the evidence of J. M. Burch hereinbefore quoted. And while no opinion was rendered in this Court and the case cannot therefore be relied on as a precedent, the justices who stood for affirmance must have reached the conclusion that the facts of the two cases were distinguishable.

For these reasons we submit that the judgment of the Supreme Court of Appeals of Virginia sustaining the

conviction of the plaintiff in error should be reversed.

Respectfully submitted,

THOMAS J. CHRISTIAN,

JOHN WINSTON READ,

Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 184.

J. G. DAVIS, PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF VIRGINIA,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, J. G. Davis, was arrested under a warrant for violating the peddler's statute, set out below, in carrying from place to place picture frames and offering to sell or barter the same, and actually selling or bartering the same, without having first obtained a license as a peddler. He was found guilty in the magistrate's court and, by successive appeals, this judgment was approved in the Supreme Court of Appeals of Virginia. (See printed record, p. 8.)

It appears from the record that one C. D. Anderson, an agent in the employment of the Empire Art Institute of Syracuse, N. Y., procured an order in the City of Newport News for enlarging a portrait from Mrs. T. P. Morrisette. The ticket which was delivered to Mrs. Morrisette when the order was taken, was one of the uniform order blanks furnished by the company to its agents throughout the United States and is in the following words and figures (printed record, p. 21):

"India Ink, $1.98. (Unframed)

Water Color, $3.96. (Unframed)

"Indp. Phone 288
"Empire Art Institute
"Specialty Paintings

"The School of Art : : Groups Extra : :Aquarrell Painting

"218 E. Washington Street,

"Syracuse, N. Y.

"Value $10.

"To introduce this new Aquarrell Portrait we will place a limited number in your neighborhood at cost of material, India Ink, $1.98, and Water Color, $3.98. Groups Extra.

"On or about April 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait..... x.....as shown by our salesman. Mrs. T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from us, but owing to the delicate nature of the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices.

"Please remember date of delivery and have the money ready as our deliverymen can make but one call to collect charges for same. Please be at home or leave money with nearest neighbor.

"(Signed) C. D. ANDERSON,
"Empire Art Institute."

The portrait thus ordered was shipped from Syracuse, N. Y., together with other portraits, by the Empire Art Institute, to J. G. Davis, the plaintiff in error, at Newport News, Va., another agent of the Empire Art Institute who had no permanent place of business in Virginia; and with the portraits were shipped frames for which no orders had been taken.

When the package arrived at Newport News, the said J. G. Davis broke the bulk and put the portrait ordered by Mrs. Morrisette in an appropriate frame. When the portrait was delivered, two other styles of frames were exhibited to the purchaser and she was given the opportunity to select one of the three styles of frames at the prices of $3.00, $4.00 and $5.00, respectively. The portraits and frames were the property of the Empire Art Institute until paid for and delivered, and neither Anderson nor Davis had any property interest therein—both were working for a salary. Several sales of frames thus offered were made.

VIRGINIA STATUTE INVOLVED.

The statute whose constitutionality is here brought into question is found in the Acts of 1902-3-4, chapter 271, p. 484 (see vol. 2, Va. Code 1904, p. 2223), and reads as follows:

> "Any person who shall carry from place to place any goods, wares or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles; and whenever a license is granted to a peddler to sell such goods, wares, or merchandise his license shall be valid for one year from date of its issue. Said license shall not be transferable, and any person so licensed shall endorse his name on the said license, and such license shall confer authority to sell at any house or place within the county or city in which the license was granted. Any peddler who shall peddle for sale or sell or barter without a license shall pay a fine of not less than one hundred dollars nor more than five hundred dollars for each offence, one-half of which shall go to the informer; and

any person selling or offering to sell as a peddler shall city or town in which he sells or offers to sell or barter, exhibit his license on demand of any citizen of the county, and upon his failure or refusal to do so he shall be subject to the penalties of peddling without a license. This section shall be construed to include persons engaged in peddling lightning rods. All persons who do not keep a regular place of business (whether it be in a house, on a vacant lot, or elsewhere), open at all times in regular business hours, and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this act. And all persons who keep a regular place of business open at all times in regular business hours, and at the same place, and who shall personally, or through their agents, offer for sale or sell, at the time of such offering or sale, deliver goods, wares, and merchandise, elsewhere than at such regular place of business, shall also be deemed peddlers as above; but this section shall not apply to those who sell or offer for sale, in person or by their employees, ice, fuel, meats, fowls, fish, game, vegetables, fruits or other family supplies of a perishable nature grown or produced by them; nor to merchants who keep a regular place of business open at all time in regular business hours and at the same place, without a city or town, who shall sell such articles to merchants only residing and doing business in a city or town."

This is the same statute whose constitutionality under the commerce clause was attacked in *Roselle* v. *Virginia*, 223 U. S. 716, 56 L. ed. 627, where this court affirmed the decision in 110 Va. 235, upholding its constitutionality.

HISTORY AND PURPOSE OF THE VIRGINIA STATUTE.

The original of the Virginia peddler's statute was enacted January 18, 1798. See Revised Code, 1803, chapter 234, p. 380. This act required the applicant for a peddler's license to obtain the same from a court of record, which license the county and corporation courts were authorized to grant, "on satisfactory proof appearing to them of the honesty and good demeanor of the person applying," thus confirming the observation made by Chief Justice Cooley in *People* v. *Russell*,

49 Mich. 617, 619, and quoted with approval by Gray, J., in *Emert* v. *Missouri*, 156 U. S. 296, at p. 308, 39 L. ed. 430:

> "That the regulation of hawkers and peddlers is important, if not absolutely essential, may be taken as established by the concurring practice of civilized states. They are a class of persons who travel from place to place among strangers, and the business may easily be made a pretence or a convenience to those whose real business is theft or fraud. The requirement of a license gives opportunity for inquiry into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretence."

That this is one of the purposes of the present Virginia statute is clear from the provisions therein contained that the license is not transferable and that "any person selling, or offering to sell, as a peddler shall exhibit his license on demand of any citizen of the county, city or town in which he sells or offers to sell or barter; and upon his failure or refusal to do so, he shall be subject to the penalties of peddling without a license."

It may be remarked, parenthetically, that the ticket delivered to the purchaser in the case at bar, if studied carefully, shows on its face certain marks which would at least put an intelligent observer on guard. Although the cost of the portrait ordered was only $1.98, the ticket purports to be worth $10.00. The representation is made that the portrait is sold at *cost of material*, that is to say, at a loss; since no charge is made for work done on the portrait, for the cost of delivery or for the agent's salary. In spite of the representation that the portrait has been sold at a loss, it is also represented that the purchaser of the portrait shall have the opportunity of selecting a frame at *wholesale prices*. When it is remembered that this was a uniform contract, used by the agents of this company all over the United States, and that its sale in this case was representative of the business done by it, this court should, as in *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430, be inclined to sustain, if possible, the state statute, designed to protect its citizens from deal-

ings, which, though palpably clear to the intelligent and alert, are designed as a baited trap for the unsuspecting.

CONSTRUCTION PUT UPON THE VIRGINIA STATUTE BY THE SUPREME COURT OF APPEALS OF VIRGINIA.

Construing the above statute, the Supreme Court of Appeals of Virginia, in *Commonwealth* v. *Myer*, 92 Va. 809, 23 S. E. 915, has adopted the definition of a peddler given by Chief Justice Shaw in *Commonwealth* v. *Ober*, 12 Cush. 493:

> "The leading primary idea of a peddler is that of an itinerant or traveling salesman who carries goods about in order to sell them, and who actually sells them to the purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business."

This definition has been approved in this court in *Emert* v. *Missouri*, 156 U. S. 296, 307, 39 L. ed. 433. Other cases in Virginia confirming this definition are *Crall* v. *Commonwealth*, 103 Va. 855, 49 S. E. 638; *Kloss* v. *Commonwealth*, 103 Va. 864, 49 S. E. 655.

It may be remarked that, in construing the statute as it formerly stood, the Supreme Court of Appeals of Virginia laid down the doctrine that the right of the state to impose a license tax upon peddlers, where it operates uniformly upon all citizens and does not discriminate in favor of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police power, and is not a regulation of commerce under the cover of that power, although incidentally it may have that effect, has been uniformly maintained; but that where any injurious discrimination is discovered in favor of a resident as against a non-resident, or with respect to the sales of articles manufactured in this state from similar articles manufactured abroad, the state law should be declared to be void as repugnant to the Constitution of the United States. Therefore, the former statute, which exempted manufacturers, who had been assessed and had paid a tax upon capital employed by them, from taking

out peddlers' licenses, was declared unconstitutional in so far as non-resident manufacturers were required to take out peddler's licenses. *Commonwealth* v. *Myer*, 92 Va. 809, 23 S. E. 915, following the cases of *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565, and *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430.

ARGUMENT.

It is clear that this is not a case in which the state law makes a discrimination in favor of home manufacturers and against the manufacturers of other states, as was the case in *Webber* v. *Virginia*, 103 U. S. 334; 26 L. ed. 565; *Myers' Case*, 92 Va., 809. Nor is it a case where the state law imposes a discriminating tax upon the residents of other states, as in *Ward* v. *Maryland*, 12 Wall. 418, 20 L. ed. 449. Nor does it belong to that class of cases in which an order is given for goods which are out of the state, and the goods are subsequently sent into the state, either directly to the purchaser or to the agent of the vendor to be delivered to the purchaser. *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. ed. 336; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 30 L. ed. 694.

Nor is this a case where, after property has entered the state, a tax or burden is laid upon it by reason of its foreign origin. *Welton* v. *Missiouri*, 91 U. S. 275, 23 L. ed. 347.

The question here involved is whether the sale of the frame at the time of the delivery of the portrait was a part of a commercially continuous transaction which formed an interstate bargain, as was the case in *Dozier* v. *Alabama*, 218 U. S. 124, 54 L. ed. 965; or whether the frame had been so acted upon by the importer that it had become incorporated and mixed up with the mass of property in the state and, therefore, subject to state taxation, as was the case in *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430. See, also, *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128.

It is contended in the brief for the plaintiff in error that the law applicable to the facts in this case has been settled in the case of *Dozier* v. *Alabama*, 218 U. S. 124, 54 L. ed. 965.

It becomes necessary, therefore, to examine critically the facts and the decision of the *Dozier Case.* It is admitted that the facts of that case are very similar to the facts in the case at bar, but there are certain specific differences to which the attention of the court is respectfully directed.

In the case at bar, the portrait was sold at a loss; for, in the ticket or contract of sale thereof, it is stated that "we will place a limited number in your neighborhood at cost of material, india ink, $1.98." If this means anything, it clearly means that the price charged for the portrait does not include the cost of workmanship or of the sale and delivery thereof; and, therefore, it cannot be said here, as in the *Dozier Case,* that the frame was sold at less than the usual price in consideration of the purchase of the portrait already made.

In the next place, the representations in the contracts as to the frames differ materially. In the *Dozier Case,* the representation was as follows:

> "All portraits are delivered in appropriate frames which this contract entitles the purchaser to accept at factory prices. Elegant patterns at retail from $4.00 to $8.00, we furnish at from $1.50 to $5.90, which is one-third to one-half the usual price." See 154 Ala. p. 85, 46 So. 9.

In the case at bar, the representation as to the frames was as follows:

> "We do not compel you to take frames from us, but owing to the delicate nature of the work, all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices."

As contemplated by the contract in the *Dozier Case,* the picture was delivered in a frame which the holder of the ticket was entitled to *accept* at a price which this court held "was generically fixed by the contract for the picture, and by that contract represented to be less than retail or usual price, in consideration, it is implied, of the purchase already agreed to be made."

In the case at bar, the contract in regard to the portrait

represented that the portrait had been sold at a loss, and that, as the work was of such a delicate nature, the picture would be deliverd in an appropriate frame, and the holder of the ticket would be given an opportunity to *select* that or other frames at wholesale prices. It seems clear that the price of no frame was generically fixed by the contract for the portrait; for the representation is that the purchaser shall have an opportunity to select a frame from two or more; and she was given an opportunity to select from three frames at three different prices. It also seems clear that, in view of the fact that this was a uniform contract employed by the same company all over the United States, and that its business of selling portraits was done at a loss in order to obtain an opportunity to sell frames, the price of the frame was not reduced "in consideration of the purchase already agreed to be made."

In the *Dozier Case* it was held that the representation in regard to the frame was an offer which was a part of the interstate bargain. As the price of no frame in the case at bar was generically fixed in the contract for the portrait, it would seem that the language of the ticket quoted above does not constitute an *offer*, but that the same is merely an *advertisement*. In the *Dozier Case*, the acceptance of the offer by the purchaser without further parley would have entitled him to take the frame in which the picture was going to be delivered at a price generically fixed by the contract for the portrait. In the case at bar, there is no offer the acceptance of which would have constituted a contract, but the purchaser of the portrait is given an opportunity to *select* a frame at a wholesale price. If the language of the contract for the portrait can be construed to be an offer, what sort of a contract would the acceptance thereof constitute? The company says:

> "This ticket entitles you to select (a frame) at wholesale prices."

If the purchaser of the portrait says, "I will accept your offer," he does not thereby become the purchaser of the frame, but simply declares his intention to avail himself of the opportunity of selecting a frame at wholesale prices. This in

no wise closes the contract for the sale of the frame. In the one case, there is an offer the immediate acceptance of which closes the contract; in the other there is no offer the immediate acceptance of which will close the contract.

It is clear, also, that in the case at bar, the sale of the portrait was merely incidental to an opportunity to sell the frame; for, as indicated before, the portrait was sold at a loss, the manufacturers taking this chance in order to have an opportunity to recoup out of the sale of a frame; whereas in the *Dozier Case*, as also in *State* v. *Coop*, 52 S. C. 508, 41 L. R. A. 501, the sale of the frame was incidental to the sale of the portrait and the price of the frame was reduced in consideration of the purchase of the portrait already made.

In the *Dozier Case*, the ticket-holder is given an option to buy at a specific price. In *Crenshaw* v. *Arkansas*, 227 U. S. 389, at p. 398, 57 L. ed. 565, this court says:

> "In *Dozier* v. *Alabama*, 218 U. S. 124, where pictures were sold to be transported and delivered in interstate commerce, and at the time they were ordered an option was taken fixing the specific price of the frame in which the picture was to be delivered, both picture and frame to be manufactured in another state and to remain the property of the vendor until sold, the sale of the frame was held to be a part of the transaction protected by the commerce clause of the Constitution, although the purchasers were not bound to take the frames unless they saw fit."

In the case at bar, no specific prices are mentioned, but the holder of the ticket is informed that he shall have the opportunity to select a frame from among other frames at wholesale prices. This is nothing more nor less than advertisement of one's wares—the seeking of an opportunity to barter, to drop from one price to another price, to offer one article and, if that be rejected, to offer another.

But, if it can be said that the purchaser of the portrait in the case at bar had, like the purchaser of the portrait in the *Dozier Case*, an option, what was that option? Simply an option to select a frame from many frames at the same price at which they were being offered all over the United

States. If the commerce clause will protect such a transaction from state taxation, then, by giving a purchaser of one article an option to purchase at specific prices articles enumerated in a catalogue, the itinerant vendor may return with his pack, or with a carload, of articles, and sell anything from a stove-lifter to a hog-ringer; and thus, by his option contract, which wraps around him the protecting aegis of the Constitution of the United States, he may escape not only state taxation, but even the suspicion, if not the contumely, once attaching to a peddler!

Therefore, we earnestly contend that the frames were not brought into the state as a result of any contractual obligation; but that having been brought into the state without any previous order therefor, and having been taken from place to place and sold at the same time that they were offered for sale by an itinerant salesman who had no fixed place of business, this case comes squarely within the rule of *Emert* v. *Missouri,* 156 U. S. 296, 39 L. ed. 430; and that the statute of Virginia now in question is in no wise repugnant to the power of Congress to regulate commerce among the several states, but that it is a valid exercise of the power of the state over persons and business within its borders (*Roselle* v. *Virginia,* 223 U. S. 716, 56 L. ed. 627, affirming s. c., 110 Va. 235), and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

JNO. GARLAND POLLARD,
Attorney General of Virginia.
CHRISTOPHER B. GARNETT,
Assistant Attorney General.

December 3, 1914.

DAVIS *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 184. Argued March 9, 1915.—Decided March 22, 1915.

The business of taking in one State orders for portraits made in another State is interstate commerce, and if the original order contemplates an option on the part of the purchaser to have a frame also sent from the other State, the business is one affair and exempt from imposition of license fee by the State in which the sale is made.

THE facts are stated in the opinion.

Mr. John Winston Read and *Mr. Thomas J. Christian* for plaintiff in error.

Mr. Christopher B. Garnett, with whom *Mr. John Garland Pollard*, Attorney General of the State of Virginia, was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of peddling without a license. His defence was that if applied to his dealings the Virginia law would interfere with commerce among the States, contrary to Article I, § 8 of the Constitution. The facts are as follows. The Empire Art Institute of New York sent soliciting agents to Virginia who took orders on a blank furnished by the Company. These blanks stated that the Company would place a limited number of a 'new Aquarell Portrait' 'at cost of material, India Ink $1.98 and Water Color $3.96,' and the one exhibited went on: "On or about Apr. 10, 1911, we agree to deliver to the holder of this contract a fully finished Ink Portrait ———x——— as shown by our salesman. Mrs. T. P. Morrisette agrees to pay $1.98 for the portrait when delivered. We do not compel you to take frames from us but owing to the delicate nature of the work all portraits are delivered in appropriate frames which this ticket entitles you to select at wholesale prices." On receipt of such order the Company shipped the portrait when prepared and, in a separate parcel, frames suitable for them to an agent, in this case the plaintiff in error. The latter put the pictures into appropriate frames and then delivered the portraits, offering the customer a choice of three different styles of frames, the customer taking one or not at his will.

The court below thought that the purchase of the frames was to be regarded as a separate transaction occurring wholly in Virginia. Whether or not this was its technical aspect as an executed contract, it often has been pointed out that commerce among the States is a practical not a technical conception. The preliminary contract bound the Company to furnish a chance to take a frame with the portrait. Obviously it was contemplated that the frames would be sent from New York as well as the pictures, as

in practice they were, and although the bargain was not complete until the Company's offer was accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce the business was one affair. *Dozier* v. *Alabama*, 218 U. S. 124. *Crenshaw* v. *Arkansas*, 227 U. S. 389. *Browning* v. *Waycross*, 233 U. S. 16, 21.

Judgment reversed.